

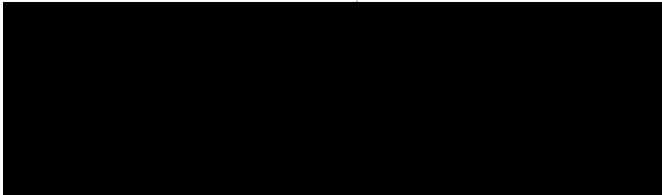
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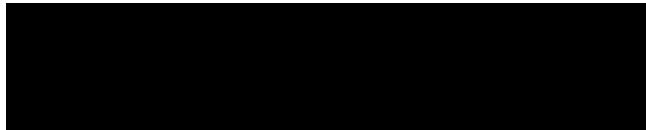
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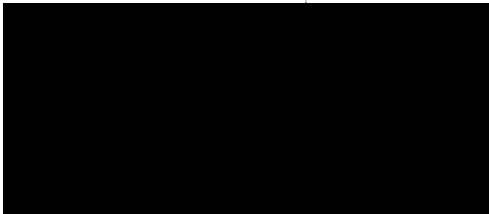
FILE: WAC 02 110 50982 Office: CALIFORNIA SERVICE CENTER Date: **FEB 3 2004**

IN RE: Petitioner:
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center acting director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a cooperative housing corporation that manages the operations and maintains the common elements of a 208-unit residential building known as the Wilshire Regent. The petitioner seeks to employ the beneficiary as an accountant, and endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101 (a)(15)(H)(i)(b).

The acting director denied the petition because she found that the petitioner had failed to establish that the proffered position is a specialty occupation.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184 (i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the acting director's request for additional evidence; (3) the petitioner's response, with documentation, to the director's request; (4) the director's denial letter; and (5) the matters submitted on appeal, including the Form I-290B and counsel's brief. The AAO reviewed the record in its entirety before issuing its decision.

The director found that the proffered position did not meet any of the qualifying criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel asserts that the acting director's denial was erroneous, and identifies specific aspects of the denial as based on factual and legal errors.

Upon review of the entire record and all of counsel's assertions on appeal, the AAO has determined that the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

Counsel correctly views an accountant as a specialty occupation position within the meaning of the Act and 8 C.F.R. § 214.2(h)(4)(iii)(A). Counsel also correctly asserts that the fact that a position's legitimate status as an H-1B specialty occupation cannot be voided by the fact that it encompasses some duties that may be performed in non-specialty occupations. However, the petition must be dismissed on other grounds.

The petitioner's reply to the acting director's Request for Additional Evidence (RFE) circumvented the request for copies of present and past job announcements, by (1) providing a copy of a non-responsive document, entitled "Notice for Labor Condition Application," which provided no details about the proffered position other than its "Accountant" title; (2) asserting that "the only 'announcement' required by the regulations is the posting of the LCA filing"; and (3) stating that the petitioner had "attempted to search for qualified professionals through internal recruitment and inquiring among business associates." The petitioner's reply did not indicate that job announcements had not been issued for the current opening or previous opening of the position. At page 2 of the brief, counsel asserts that regulations "do not require disclosure" of job announcements.

The regulation at 8 C.F.R. § 103.2(b)(8) states that CIS has the authority to request additional evidence if CIS determines that the evidence submitted "raises underlying questions regarding eligibility." Furthermore, 8 C.F.R. § 103.2(b)(13) states that a petition shall be considered abandoned and, therefore, denied "[i]f all requested initial evidence is not submitted by the required date." The AAO finds that the acting director's request for copies of job announcements was a reasonable exercise of authority in light of the general description of duties that the petitioner had provided. Job announcements often include a description of duties and a statement of the education, training, and experience that the employer finds necessary for the position. The AAO also finds that the petitioner's response to the RFE on job announcements was non-responsive on a material matter with regard to the specialty occupation issue. Accordingly, the petition should be dismissed in accordance with 8 C.F.R. § 103.2(b)(13) for failure to respond to an RFE.

Aside from the failure to reply to the request for evidence, the appeal must be dismissed because the evidence in the record fails to establish that the proffered position is an accountant as the petitioner asserted.

In analyzing the evidence, the AAO first applies the criteria at 8 C.F.R. § 214.2 (h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent that is the normal minimum requirement for entry into the particular position; a degree requirement that is common to the industry in parallel positions among similar organizations; or a particular position that is so complex or unique that it can be performed only by an individual with a degree.

The duties that may possibly be those of an accountant were described in terms too general to determine whether they actually require the theoretical and practical application of the highly specialized knowledge associated with a bachelor's degree or higher, or the equivalent, in accounting. This excerpt from the brief is indicative of the generality:

The distinguishing factor between specialty and non-specialty occupations is that those in specialty occupations ***also must perform duties also must perform duties that those in non-specialty occupations cannot perform***, and based on petitioner's job description, most of the duties will include, **analyzing** the financial information, preparing the company's financial statements, generating financial reports and maintaining the company's accounting systems – all of which clearly require the highly specialized knowledge in the field of accounting and **cannot be performed by bookkeepers**. (Emphasis in original.)

Analysis of financial information, generation of financial reports, and maintenance of the petitioner's financial reports do not necessarily require a bachelor's degree in accounting or the equivalent. Critical factors include the particular nature of the analysis, the kinds of financial reports and their addressees, the specific accounting principles that must be applied, and the level of accounting knowledge that is required. The evidence of record does not present these factors, and CIS will not speculate about them. Furthermore, counsel's assessment that the duties are clearly accountant duties is not persuasive. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The AAO routinely consults the DOL's *Occupational Outlook Handbook (Handbook)* for its information about the duties and educational requirements of particular occupations. Here the AAO consulted the 2002-2003 edition of the *Handbook* and found that the duties of the proffered position are not described with sufficient detail in the record for a determination that they substantially comport with the *Handbook's* description of the accountant occupation.

The AAO rejects counsel's view, indicated at pages 1 and 2 of the brief, that a job description establishes a position as an accountant if that description paraphrases, closely resembles or, as counsel says, "comports with" the Department of Labor's (DOL) *Dictionary of Occupational Titles (DOT)* and the *O*Net* descriptions of an accountant. The *DOT* and the *O*Net* only provide broad descriptions of general duties performed by a general occupation; they do not relate the particular duties of a particular position within an occupation. They fail to provide CIS with meaningful information about what specific tasks the proffered position requires, and even about whether they fall within the general descriptions of the *DOT* and the *O*Net* descriptions.

The evidence in the record does not demonstrate that the proffered position is one that requires the application of the highly specialized knowledge that is associated with a bachelor's degree or higher in accounting, or any other specific specialty. Accordingly, the evidence does not meet the 8 C.F.R. § 214.2 (h)(4)(iii)(A)(I) criterion for a position that normally requires a bachelor's degree or higher, or the equivalent, in a specific specialty.

The criterion at 8 C.F.R. § 214.2 (h)(4)(iii)(A)(2) is not a factor. The petitioner focused exclusively on trying to establish the proffered position as an accountant, which is a specialty occupation. Accordingly, no evidence was presented on the criterion of a degree requirement that is common in the proffered position's industry.

The AAO also found that the evidence of record does not qualify the proffered position under the second prong of 8 C.F.R. § 214.2 (h)(4)(iii)(A)(2), that is, as one that is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. The evidence fails to establish that the

proffered position is more unique or complex than that which the *Handbook* describes for a bookkeeping clerk at a small establishment, a position that does not usually require a baccalaureate or higher degree in any specific specialty. Therefore, the petitioner has not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

As the petitioner presented no evidence on whether the petitioner has regularly required a bachelor's degree in a specific specialty for the proffered position, the position cannot qualify as a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position.

Finally, the AAO turns to the criterion 8 C.F.R. § 214.2(h)(iii)(A)(4) – the nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree in accounting or any other specific specialty. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. For this reason, and, separately, because the petitioner failed to respond to an RFE, the AAO shall not disturb the director's denial of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.